

# Admissibility of Patient's Statement of Past Pain and Suffering Made to a Physician for the Purpose of Securing Treatment

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the reservation of title within ten days after the seller learns of the removal, or else such reservation is void as against "any purchaser from or creditor of the buyer, who, *without notice of such provision*, purchases the goods or acquires by attachment or levy a lien upon them . . ." (italics added).<sup>23</sup> It seems clear therefore that as against one who does have actual notice prior to the purchase or attachment, the re-filing of the contract is not necessary. If, on the other hand, actual notice is received after the attachment or purchase, then re-filing within ten days is essential to preserve the seller's security interest.<sup>24</sup> To hold otherwise, as in the *Frontier Motors* case, that actual or personal notice is sufficient, ignores the clear distinction contained in section 5 between creditors and purchasers who have notice before the purchase or attachment, and those who do not. It is also important to note that a conditional vendor has a decided advantage even in the case where the creditor or purchaser did not have notice when he made the attachment or the purchase. Section 14 gives the seller ten days after he first learns of the removal in which merely by filing the reservation of title, he may secure a priority over the innocent creditor or purchaser. Thus, bearing in mind that the Uniform Conditional Sales Act purports to protect the bona fide purchaser and others from secret liens and hidden claims,<sup>25</sup> it seems essential to limit the means available to the conditional vendor to retain his superior security interest as against purchasers or creditors who did not have notice when they acted, by strictly construing the statute to require filing or recording of the seller's reservation of title.

RICHARD J. ASH

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**Admissibility of Patients' Statement of Past Pain and Suffering Made to a Physician for the Purpose of Securing Treatment—**Plaintiff brought an action for personal injuries arising out of an intersection collision. Prior to any contemplated suit, plaintiff sought and received the professional services of a physician. The trial court

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provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

<sup>23</sup> *Ibid.*

<sup>24</sup> An interesting issue is raised in the case where the seller does prevail under section 14 and seeks damages instead of recovery of possession. Although the issue is an important one as far as the parties go, few courts have discussed the problem. In the *Frontier Motors* case, however, the court pointed out that the correct measure of damages is that the vendor is entitled to recover the amount of his special interest, i.e., the unpaid balance under the contract plus incidental expenses, or the value of the chattel at the time of trial, whichever of the two is the lesser amount.

<sup>25</sup> *Supra*, note 19.

excluded testimony offered on the part of the plaintiff's medical expert relating to past events and past history. *Held*: Affirmed.

A recitation of past events or past history even by an attending physician testifying as an expert, constitutes hearsay and is without function. . . . Mere descriptive statements of a sick or injured person as to symptoms and effects of his injury or malady are only admissible when they have been made to a medical attendant for the purpose of medical treatment. They must, however, relate to existing pain or other symptoms from which the patient is suffering at the time and they must not relate to past transactions or symptoms, however closely these may be related to the present sickness or the present suffering from the injury. *Berg v. Ullevig*, 70 N.W. 2d 133 (Minn. 1955).

The court in the principal case has followed the majority rule in prohibiting a medical expert to testify concerning a patient's statement of past pain and suffering where the patient's purpose in securing the physician's services was for treatment<sup>1</sup>. A brief discussion of the problems with reference to statements made by patients to lay persons and physicians regarding present and past pains or other symptoms is necessary for a true understanding of the admissibility or non-admissibility of such statements.

The rules governing the reception of evidence of this nature given by lay persons were clearly stated by the late Justice Winslow of the Wisconsin Supreme Court in an early Wisconsin case:<sup>2</sup>

All persons may testify as to facts within their observation as to the physical condition of another with whom they have consorted; for example whether such person appeared to be in good or bad health, sick or well, suffering from pain or disease or enjoying health. . . .

When bodily pain is in issue all persons may testify as to expressions, gestures or exclamations indicating present pain, whether made at the time of the injury or afterwards. . . .

Witnesses are not permitted to testify to complaints or statements of physical condition or feelings made by an injured person which were made in answer to a question, or which are narrative in their nature, and which are not part of the *res gestae*.

When the court refers to "witnesses" in the last sentence, it may be assumed that it refers to lay persons only and not to physicians. To enable a lay person to testify concerning statements made by an injured party, such statements must be classified under the *res gestae* exception to the hearsay rule as "spontaneous manifestations of distress." In other words the expression of pain on behalf of the injured party must be spontaneous and not in narrative form or in answer to a question.

<sup>1</sup> Numerous cases will be found in 64 A.L.R. 557.

<sup>2</sup> *Keller v. Gilman*, 93 Wis. 9, 66 N.W. 800 (1896).

Statements made to a physician not for the purpose of treatment or advice, but for the purpose of qualifying him as a witness for trial when suit is either contemplated or begun are universally held inadmissible.<sup>3</sup> The reasons for excluding such statements are obvious. With a contemplated suit in mind, the trustworthiness of any statement which a party might make to his physician is immediately put in question.

It is obvious that a patient's statements to his physician cannot serve a dual purpose, i.e., the purpose of treatment and at the same time to qualify the physician as an expert. Our Supreme Court held that statements of the patient to his physician are admissible only when they are made for the sole purpose of obtaining treatment before litigation was begun or threatened.<sup>4</sup>

Statements made by a patient to his physician for the sole purpose of obtaining treatment and advice concerning his present pain and sufferings are universally held to be admissible.<sup>5</sup> The courts hold that such statements of pain and suffering are regarded as spontaneous, free from all motives to misrepresent and that consequently the danger of insincerity is slight. Such statements are not made with any self-serving purpose. There is every reason to believe that they are true, because it would be absurd for a patient to make false statements to a physician who is to treat the ailment and who must base his treatment in part on such statements.

The question of the admissibility of a patient's statements made to his physician for the sole purpose of treatment concerning past pain and suffering has left the courts in much discord. The principal case follows the majority rule in rejecting such evidence.<sup>6</sup> The principal case and a majority of the courts draw a distinction between declarations expressive of existing pain or suffering and mere narrative statements of past pain and suffering. The former are regarded as "spontaneous manifestations of distress" while the latter are regarded merely as hearsay and consequently not admissible.

Reason, however, leads us to the conclusion that the distinction in the rules which rejects the admission of statements made by a patient to his physician as to past pain and suffering and allows statements made by such patient to his physician as to his present pain and suffering should be abolished. Professor Edmund M. Morgan, a leading

<sup>3</sup> Cases collected in 67 A.L.R. 10, 15-18 (1930); 80 *Id.* 1527 (1932); 130 *Id.* 977 (1941). 1 WIGMORE, EVIDENCE, p. 2250, §1747; 20 Am. Jur. p. 530, §625; 2 JONES, EVIDENCE, p. 2233, §1217.

<sup>4</sup> *Kath v. Wisconsin Central RR. Co.*, 121 Wis. 503, 99 N.W. 217.

<sup>5</sup> *Northern Pac. RR. Co. v. Urlin*, 158 U.S. 271, 15 S.Ct. 840, 39 L. Ed. 977 (1895); *Yellow Cab Co. v. Henderson*, 183 Md. 546, 39 A.2d 546 (1944); *Munden v. Metropolitan Life Ins. Co.*, 213 N.C. 504, 196 S.E. 872, (1938); 6 WIGMORE, EVIDENCE, §1714.

<sup>6</sup> *Supra*, notes 1 and 5; McCORMICK ON EVIDENCE, §265, §266 (1954).

authority on the law of Evidence in his recent publication *Basic Problems of Evidence* makes the following comment:<sup>7</sup>

Declarations of Past Pain and Other Symptoms. A patient who consults a physician or surgeon for treatment has every reason for answering truly all pertinent questions put to him concerning his past symptoms both subjective and objective. And generally speaking no medical attendant will treat or prescribe for a patient without hearing and considering the history of his condition. For the reasons a few courts have wisely held admissible declarations as to past pain and other mental or bodily condition when made to a medical attendant for the purpose of securing medical treatment.

Courts which admit testimony of present as well as of past symptoms hold that a person consulting a physician for treatment has no motive to falsify statements whether they concern his present or past ailments.<sup>8</sup> In an early Massachusetts case the court uses the following language:<sup>9</sup>

While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations and feelings, both past and present. In both cases, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained.

Leading authorities on this subject seem to be in accord with the minority rule.<sup>10</sup>

The Supreme Court of Wisconsin follows the minority rule and permits the admission of both present and past symptoms when related to a physician by a patient solely for the purpose of securing medical treatment. This rule was stated by the late Justice Winslow briefly as follows:<sup>11</sup>

The statements and declarations of a patient as to his pains and feelings, when made to a physician for the purpose of treatment, may be given in evidence.

In a recent Wisconsin case our Supreme Court followed the rule above stated.<sup>12</sup> In this case it appears that a Mrs. Johnson was injured at her place of employment. She testified that immediately after the

<sup>7</sup> MORGAN, *BASIC PROBLEMS OF EVIDENCE*, Vol. II, p. 287 (1954).

<sup>8</sup> *Meany v. United States*, 112 F.2d 538, 130 A.L.R. 973 (2d Cir. 1940); *Kraettli v. North Coast Transportation Co.*, 166 Wash. 186, 6 P.2d 609, 80 A.L.R. 1520 (1932).

<sup>9</sup> *Rossa v. Boston Loan Co.*, 132 Mass. 439 (1882).

<sup>10</sup> *MCCORMICK ON EVIDENCE*, §266 (1954); *Supra*, note 7.

<sup>11</sup> *Supra*, note 2.

<sup>12</sup> *Brouwer v. Industrial Comm.*, 266 Wis. 73, 62 N.W.2d 577 (1953).

accident she became nauseated. Dr. Dundon was called as an expert by the plaintiff. "He testifies as to subjective symptoms which he had found and as to the effect that she had told him at his first examination 'there was no unconsciousness right after the injury, but nausea, vomiting, and headaches, and three days later dizziness' . . ." Mrs. Johnson was injured on Aug. 10, 1949 and Dr. Dundon saw her for the first time on July 20, 1950. On page 79 of the opinion we find the following language:

Mrs. Johnson testified that she became nauseated; she did not testify she had vomited. Dr. Dundon testified that when he first examined her she told him that she had suffered 'nausea, vomiting, and headaches.' The statement was made by her for the purpose of treatment and was properly received in evidence. (cases cited.)

It is reasonable to assume that the same trustworthiness which exists when the physician testifies as to present symptoms exists as to past symptoms. Why should the patient attempt to deceive the physician in the first instance, and not in the last instance. For a physician to treat a patient without first questioning him concerning all symptoms relating to his pain, both present and past, would be unreasonable.

JOHN M. SWIETLIK



## from START to FINISH

It's easy to pick a good horse at the finish  
—but mighty difficult at the start.

So it is with a case or statute:

Many a decision obtained from a digest, encyclopedia, text book, annotation, etc., or a statute obtained from a case, annotation or index, seems all right in the beginning, but looks like an “also ran” after it has been checked up in Shepard's Citations.

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